No. 23-14

In the Supreme Court of the United States

DELILAH GUADALUPE DIAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in admitting expert testimony about typical circumstances of drug couriers.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is available at 2023 WL 314309.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2023. A petition for rehearing was denied on March 3, 2023 (Pet. App. 7a). On May 2, 2023, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 1, 2023, and the petition was filed on June 30, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of importing methamphetamine, in

violation of 21 U.S.C. 952 and 960. Judgment 1. She was sentenced to 84 months of imprisonment, to be followed by five years of supervised release. Judgment 2-4. The court of appeals affirmed. Pet. App. 1a-6a.

1. At 2 a.m. on August 17, 2020, petitioner—an American citizen living in Moreno Valley, California—entered the United States from Mexico at the San Ysidro Port of Entry as the driver and sole occupant of a Ford Focus. C.A. S.E.R. 29-30, 77-79, 120-122. In primary inspection at the border, petitioner gave a negative customs declaration, told the inspector that she was going to San Diego, and said that the car belonged to her boyfriend. *Id.* at 82.

When the inspector asked her to roll down the rear window, petitioner replied that it was manual. C.A. S.E.R. 80. The inspector then opened the rear door and tried to roll down the window himself. *Ibid.* Upon doing so, he heard a "crunch-like sound" in the door and felt "some resistance." *Ibid.*

During a secondary inspection, agents found 56 packages hidden in the doors and quarter panels of the Ford. C.A. S.E.R. 88-96, 123-128. Agents later determined that the packages contained about 54½ pounds (24½ kilograms) of pure methamphetamine, conservatively valued at $368,550. C.A. E.R. 56; C.A. S.E.R. 104, 129. Petitioner also had two cell phones in her possession, and a subsequent examination of the car revealed a hidden GPS device. C.A. E.R. 150; C.A. S.E.R. 134.

Petitioner waived her *Miranda* rights and agreed to speak to Homeland Security Investigations Agent Jeffrey Porter. C.A. S.E.R. 29. During the interview, petitioner denied knowledge of the methamphetamine. *Id.* at 33. Petitioner claimed that she had been in Mexico to visit her boyfriend named "Jess[]e" (whom she

once called "Jesus") in Rosarito, which is 1½ hours south of the border. *Id.* at 34-35, 39, 50. She claimed to have seen Jesse "maybe two, three times tops" over the course of the three months that she had known him. *Id.* at 35. Petitioner stated that she did not know where Jesse lived, *id.* at 34, but that he did not live in Rosarito, *id.* at 36, and she did not know his phone number because he always called her from "different numbers," *id.* at 51.

Petitioner told Agent Porter that she had driven to Mexico on the Friday before her arrest with her daughter, who was also going to Rosarito that weekend with some friends. C.A. S.E.R. 37. Petitioner claimed that she had initially planned to return to the United States with her daughter, but chose to stay when Jesse said he would lend her his car to drive back. *Id.* at 40. According to petitioner, she spent Friday night with Jesse and his friends at a bar and slept at the home of one of the friends, but she could not name anyone at the bar or the owner of the home. *Id.* at 41-44.

Petitioner stated that the following day, Jesse was gone when she awoke and did not return until around 5 p.m. C.A. S.E.R. 44. She claimed that when Jesse came back, she was upset and wanted to go home, but she did not leave that evening because she "can't really see" to drive "when it's dark." *Id.* at 46. Petitioner asserted that she again stayed at the friend's home that night, spent the following day in Mexico with Jesse, and—despite her alleged eyesight issues—departed on Sunday at around 7 p.m., with the plan that Jesse would retrieve his car from her home in a couple of days. *Id.* at 47-49.

As for the cell phones, petitioner admitted that one of them was hers, but she told Agent Porter that the

other was "given to [her]" and was "locked," so she could not access it. C.A. S.E.R. 51. Petitioner also told Agent Porter that she would "rather not say" who the second phone belonged to, *id.* at 53, but maintained that it was "not Jess[]e," *id.* at 51.

2. A grand jury in the Southern District of California charged petitioner with importing methamphetamine in violation of 21 U.S.C. 952 and 960. Indictment 1. The case proceeded to trial.

a. Before trial, the parties filed notices of intent to call expert witnesses under Federal Rule of Criminal Procedure 16. The government stated that it would call Homeland Security Investigations Special Agent Andrew Flood as an expert witness on the structure and practices of drug trafficking organizations, including the use of unknowing couriers. C.A. S.E.R. 18-22. Petitioner stated that she intended to call automobile expert Kenneth Davis as a defense witness to assist the jury in understanding where and how the drugs were hidden in the Ford. *Id.* at 11-14. Petitioner represented that "[t]he only issue in this case is knowledge, specifically whether [petitioner] knew that there were drugs hidden in the vehicle she was driving," and that Davis's testimony would "assist the trier of fact to understand the evidence and to determine a fact in issue." *Id.* at 13-14.

The government subsequently filed a motion in limine to admit, among other things, Agent Flood's expert testimony regarding drug trafficking practices and operations, including testimony that drug dealers "[g]enerally do not entrust large quantities of drugs to couriers that are unaware they are transporting them." C.A. E.R. 342; see *id.* at 339-342. In response, petitioner moved to exclude the government's proposed

expert testimony under Federal Rules of Evidence 401, 403, and 704(b). C.A. E.R. 344-356. At a pretrial motions hearing, the district court determined that Agent Flood could provide modus-operandi evidence about the structure of drug trafficking organizations, and could testify that unknowing couriers are not used in a majority of cases, but could not testify that unknowing couriers are never used. Pet. App. 32a-33a.

b. At trial, Agent Flood provided expert testimony during the government's case-in-chief on the practices and methods of drug trafficking organizations. Pet. App. 10a-28a. He provided testimony that the United States provides a market for drugs manufactured in Mexico, that "people are willing to pay a good price for the drugs," that drug dealers often smuggle drugs in hidden compartments in cars and other conveyances from Mexico to the United States, and that transporters are compensated. *Id.* at 14a; see *id.* at 14a-15a. The prosecutor then asked Agent Flood whether "large quantities of drugs [are] entrusted to drivers that are unaware of those drugs?" *Id.* at 15a. Over petitioner's objection, Agent Flood testified: "No. * * * [I]n most circumstances, the driver knows they are hired. It's a business. They are hired to take the drugs from point A to point B." *Ibid.* When asked why drug dealers generally do not use unknowing couriers, Agent Flood stated that using an unknowing courier created a "risk of your * * * cargo not making it to the new market * * * not delivering your product and, therefore, you're not going to make any money." *Id.* at 16a.

On cross-examination, Agent Flood noted that he was not involved in the investigation of this particular case. Pet. App. 21a. And while maintaining that the use of an unknowing courier was "very rare," he admitted

that that he was aware of three schemes that had been as identified as involving possible uses of an unknowing courier. *Id.* at 22a-25a. He also testified that a viable scheme using an unknowing courier would require the perpetrator to know "where the driver was going," the driver's "specific address," and "when" the driver was crossing the border, and that such schemes could be facilitated using GPS trackers, *id.* at 24a, 25a, 27a.

During the defense case, petitioner presented Davis as an expert in "automobile mechanics and repair" based on his experience working with and teaching students about cars. C.A. S.E.R. 139-144. Davis testified that he had physically examined petitioner's Ford Focus at a Homeland Security lot, and that he had reviewed the government's report of the investigation, including relevant photos, regarding the seizure of the drugs from that car. *Id.* at 144-158. Based on his expertise, his review of the government's report, and his personal inspection of the vehicle, Davis saw "no way for someone to suspect or know that there w[ere] drugs hidden within that car." *Id.* at 159.

c. In its final charge, the district court instructed the jury that it could accept or reject the opinion testimony of the government and defense experts and could give that testimony the weight the jury believed it deserved. D. Ct. Doc. 72 (Mar. 22, 2021). The jury found petitioner guilty. C.A. E.R. 382.

Before sentencing, in a proffer with the government, petitioner admitted that "[t]here is no Jesse," that she "made him up," C.A. S.E.R. 172, and that she knew the drugs were in the car and had imported drugs from Mexico before, *id.* at 166-167, 173. Taking petitioner's acknowledgement of guilt into account, the district court varied substantially downward from the Sentencing

Guideline range of 235 to 293 months, and sentenced petitioner to 84 months of imprisonment. *Id.* at 187.

4. The court of appeals affirmed in an unpublished memorandum decision, finding that the district court had not abused its discretion in admitting Agent Flood's modus-operandi testimony. Pet. App. 1a-6a; see *id.* at 5a-6a. The court rejected petitioner's argument that the testimony was irrelevant and unduly prejudicial, explaining that such evidence is relevant when a defendant puts on an unknowing courier defense because it goes "right to the heart" of that defense. *Id.* at 5a-6a (citation omitted). And the court observed that petitioner "opened the door" to the government's expert testimony by presenting her own expert to testify to facts that supported her unknowing-courier defense. *Id.* at 6a (citation omitted).

The court of appeals also rejected petitioner's argument that testimony that drug trafficking organizations rarely use unknowing couriers is the functional equivalent of expert opinion on mental state, which is prohibited by Federal Rule of Evidence 704(b). Pet. App. 6a. While noting one Fifth Circuit decision supporting that view, the court of appeals adhered to circuit precedent under which such testimony is permitted so long as the expert does not give an "explicit opinion" on the defendant's mental state. *Ibid.* (citation omitted). And the court found that Agent Flood "did not do so here." *Ibid.*

ARGUMENT

Petitioner renews her contention (Pet. 8-25) that Agent Flood's expert testimony "state[d] an opinion about whether [she] did or did not have a mental state * * * that constitutes an element of the crime," in violation of Federal Rule of Evidence 704(b). Pet. 18 (citation and emphasis omitted). The court of appeals'

decision is correct and does not warrant further review. The scope of circuit disagreement is narrow, and any error in this particular case was harmless. This Court has previously denied a petition that presented a similar issue, see *Caraballo-Rodriguez* v. *United States*, 137 S. Ct. 1065 (2017) (No. 16-6080), and it should follow the same course here.

1. A qualified expert may provide opinion testimony in federal court if the expert's "specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Although an expert's opinion generally "is not objectionable just because it embraces an ultimate issue," Fed. R. Evid. 704(a), Rule 704(b) specifies that "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense," Fed. R. Evid. 704(b). Thus, as the court of appeals has explained, Rule 704(b) "allows testimony supporting an inference or conclusion that the defendant did or did not have the requisite *mens rea*, so long as the expert does not draw the ultimate inference or conclusion for the jury and the ultimate inference or conclusion does not necessarily follow from the testimony." *United States* v. *Morales*, 108 F.3d 1031, 1038 (9th Cir. 1997).

Accordingly, numerous circuits recognize that if "it is made clear, either by the court expressly or in the nature of the examination, that the opinion is based on the expert's knowledge of common criminal practices, and not on some special knowledge of the defendant's mental processes," Rule 704(b) is satisfied. *United States* v. *Are*, 590 F.3d 499, 512-513 (7th Cir. 2009) (citation omitted), cert. denied, 562 U.S. 946 (2010); see, *e.g.*, *United*

States v. *Archuleta*, 737 F.3d 1287, 1297 (10th Cir. 2013) (interpreting Rule 704(b) "as prevent[ing] experts from expressly stating the final conclusion or inference as to a defendant's mental state, but not prevent[ing] the expert from testifying to facts or opinions from which the jury could conclude or infer the defendant had the requisite mental state") (citation and internal quotation marks omitted; brackets in original), cert. denied, 573 U.S. 938 (2014); *United States* v. *Winbush*, 580 F.3d 503, 512 (7th Cir. 2009) (explaining that an expert "may testify in general terms about facts or circumstances from which a jury might infer that the defendant intended to distribute drugs"); *United States* v. *Combs*, 369 F.3d 925, 940 (6th Cir. 2004) (explaining that an expert cannot "actually refer[] to the intent of the defendant" but can "describe[] in general terms the common practices of those who clearly do possess the requisite intent") (citation omitted); *United States* v. *Vasquez*, 213 F.3d 425, 427 (8th Cir. 2000) (finding "no improper opinion concerning [defendant's] personal knowledge" in testimony "that drug traffickers do not typically use couriers who are unaware that they are transporting drugs").

In accord with that application of Rule 704(b), the court of appeals in this case correctly found that Agent Flood's expert testimony did not violate Rule 704(b). Agent Flood did not "state an opinion," Fed. R. Evid. 704(b), that petitioner herself had the requisite mens rea to be found guilty. Agent Flood made clear that he "had no involvement in the investigation of this case," and that he did not personally search the Ford. Pet. App. 21a. Indeed, he did not refer to petitioner during his testimony at all. *Id.* at 10a-27a. Instead, Agent Flood provided expert testimony drawn from his experience investigating other drug dealers, which

demonstrated that drug traffickers ordinarily do not use unknowing couriers. *Id.* at 23a-25a. And consistent with the district court's ruling that he could not testify that drug traffickers exclusively work with knowing couriers, *id.* at 32a-33a, Agent Flood acknowledged several possible schemes using unknowing couriers, including situations in which the traffickers use GPS devices, *id.* at 23a-25, 27a.

2. Petitioner errs in claiming (Pet. 18-25) that Rule 704(b) barred Agent Flood's testimony simply because the jury could infer, if it wished, that petitioner shared the same knowledge that Agent Flood commonly observed in other couriers. Contrary to petitioner's contention (Pet. 19), expert testimony that most drug couriers know that they are carrying drugs does not "amount[] to an opinion" on a specific defendant's mental state. Expert testimony that most drug couriers know that they are conveying drugs does not logically mean that all drug couriers do. And the defense is free to emphasize that point through cross-examination, as petitioner's counsel did here. See Pet. App. 21a-25a, 27a.

Upon hearing that testimony, the jury is then free to decide whether the defendant is a knowing or unknowing courier. See, *e.g.*, *United States* v. *Augustin*, 661 F.3d 1105, 1123 (11th Cir. 2011) (per curiam) (explaining that the prohibition in Rule 704(b) "does not require the exclusion of expert testimony that supports an obvious inference with respect to the defendant's state of mind if that testimony does not actually state an opinion on this ultimate issue, and instead leaves this inference for the jury to draw") (brackets, citation, and internal quotation marks omitted), cert. denied, 566 U.S. 981, and 566 U.S. 1015 (2012); *Combs*, 369 F.3d at 940

(similar). And because the jury is free to reject the inference, petitioner is incorrect in asserting (Pet. 21-23) that the court of appeals has effectively lowered the government's burden to show the defendant's mental state by allowing it to rely on expert testimony regarding the characteristics of most drug couriers.

Petitioner offers no sound reason why providing non-particularized evidence of drug-courier practices, from which a jury can either draw or not draw an inference supporting a particular defendant's knowledge, is "stat[ing] an opinion about whether the defendant did or did not have a mental state." Fed. R. Evid. 704(b). Her suggestion (Pet. 23) that the court of appeals' approach will ultimately result in the admission of testimony that defendants who carry drugs *always* know that they are transporting drugs is misplaced. The court has made clear that it evaluates expert testimony regarding unknowing couriers "on a case-by-case basis, not pursuant to per se rules," see *United States* v. *Sepulveda-Barraza*, 645 F.3d 1066, 1072 (9th Cir. 2011), so there is no basis from which to infer that it will uphold expert testimony that all drug couriers possess the requisite knowledge. And indeed, in this case, the district court expressly precluded Agent Flood from offering such testimony. Pet. App. 32a-33a.

Petitioner's attempt (Pet. 24) to invoke due process considerations is likewise unfounded. Citing cases involving legal presumptions, petitioner argues that the court of appeals' approach "allows the [g]overnment to establish a rebuttable presumption of mens rea," thereby raising "serious constitutional concerns." *Ibid.*; see *Francis* v. *Franklin*, 471 U.S. 307, 317-318 (1985); *Sandstrom* v. *Montana*, 442 U.S. 510, 521 (1979). But that analogy is inapt. If accepted, it could suggest

that much testimony tending to prove a disputed fact could be characterized as creating an impermissible "rebuttable presumption" in favor of finding that fact. Expert testimony is a form of factual evidence quite different from a mandatory presumption that requires a jury to infer a presumed fact if the government proves certain predicate facts. See, *e.g.*, *Francis*, 471 U.S. at 313-327.

Furthermore, as a practical matter, the government does not ordinarily seek to prove a drug courier defendant's knowledge solely by expert testimony. In this case, for example, the government presented independent evidence, including petitioner's inconsistent pretrial statements and the large quantity of methamphetamine found in her car, which indicated that petitioner knew she was transporting drugs. See p. 16, *infra*. Agent Flood's expert testimony was only one piece of the government's evidence of petitioner's intent.

3. Petitioner argues (Pet. 8-10) that this Court should grant review because the decision below conflicts with decisions from the Fifth Circuit, including *United States* v. *Lara*, 23 F.4th 459, 476-477, cert. denied, 142 S. Ct. 2990 (2022), and *United States* v. *Gutierrez-Farias*, 294 F.3d 657, 663 (2002). In those decisions (and others), the Fifth Circuit has reasoned that Rule 704(b) forbids an expert from "offering a direct opinion as to the defendant's mental state" or from "giving the 'functional equivalent' of such a statement." *United States* v. *Morin*, 627 F.3d 985, 995 (5th Cir. 2010) (citation omitted), cert. denied, 563 U.S. 950 (2011); accord *United States* v. *Ramos-Rodriguez*, 809 F.3d 817, 825-826 (5th Cir.) (per curiam), cert. denied, 578 U.S. 987 (2016). And it has concluded that an expert's testimony that drug couriers generally "know" what they

are carrying is the functional equivalent of a direct opinion about the mental state of a similarly situated defendant. See *Gutierrez-Farias*, 294 F.3d at 663. But the disagreement between the Fifth Circuit and other circuits does not warrant this Court's review.

No other circuit has adopted the Fifth Circuit's understanding of Rule 704(b), see pp. 8-9, *supra*, and the scope of the Fifth Circuit's disagreement is narrow in practice and depends heavily on the facts and particular testimony at issue in each case. Even under the Fifth Circuit's approach, an expert is permitted to identify "certain characteristics of drug [couriers]" so long as the witness does not "draw a connection between the characteristic[s] and the defendant," *Ramos-Rodriguez*, 809 F.3d at 826, and "context is necessarily important" in deciding on which side of the line the testimony falls, *United States* v. *Gonzalez-Rodriguez*, 621 F.3d 354, 364 (5th Cir. 2010), cert. denied, 562 U.S. 1234 (2011). In *United States* v. *Montes-Salas*, 669 F.3d 240 (2012), for example, the Fifth Circuit found most of the challenged expert testimony admissible even under its "functional equivalent" standard because the testimony provided "legitimate background * * * about how an alien trafficking operation works," and the "different roles of guides, drivers, and recruiters" in such operations. *Id.* at 250 (citations and internal quotation marks omitted). The court also recognized that an expert opinion that would otherwise be inadmissible may nevertheless be admissible if, when viewed in context, it "is used to rebut the defendant's innocent explanation for his behavior." *Id.* at 248.

Similarly, in *United States* v. *Ramos-Rodriguez*, the agent described numerous "characteristics of drug couriers," including that drug couriers are "matched to the

type of vehicle they drive," such that a "cowboy-type" would drive a "pickup truck"; the hiding of drugs in a vehicle's empty space; the dumping of license plates to avoid scrutiny; the use of "burner" cell phones; and the general time line for couriers' roundtrip travel from Mexico to "hub" cities in the United States. 809 F.3d at 826. The Fifth Circuit determined that because the agent provided "an explanation of the facts of the case" and "made no assertion or generalization regarding [the defendant's] knowledge," the challenged testimony was "not the 'functional equivalent' of an opinion that [the defendant] knew he was transporting drugs." *Ibid.* (citation omitted). Under that approach, most of the testimony offered in this case by Agent Flood was permissible. Accord *Morin*, 627 F.3d at 995-996. And although the Fifth Circuit disallows testimony to the effect that most couriers know they are transporting drugs, *Gutierrez-Farias*, 294 F.3d at 663, it has equally recognized that such testimony may be harmless, see *id.* at 663-664. That is the case here. See pp. 15-17, *infra*. Accordingly, the narrow disagreement does not warrant this Court's review.

To the extent that petitioner suggests (Pet. 15-16) that certiorari is warranted to address disagreement in the courts of appeals with respect to the scope of Rule 704(b) in other contexts, those contexts are not presented in this case. In any event, petitioner errs in suggesting that the First and Third Circuits conflict in their approach to expert testimony about the correlation between drug quantity and intent to distribute. The First Circuit has found that "expert testimony that 'explained that the quantity of crack found at the search site was consistent with distribution, as opposed to personal use' in a case concerning intent to distribute drugs

did not violate Rule 704(b)." *United States* v. *Soler-Montalvo*, 44 F.4th 1, 14 (2022) (quoting *United States* v. *Valle*, 72 F.3d 210, 216 (1st Cir. 1995). The Third Circuit has similarly recognized that an expert may testify about "quantity, purity, usual dosage units, and street value of narcotics," as well as the "common practices of drug dealers" in a way that "supports an inference or conclusion that the defendant" had "the requisite mens rea." *United States* v. *Watson*, 260 F.3d 301, 308-309 (3d Cir. 2001) (brackets and citation omitted). And the court noted that it is "only as to the last step in the inferential process—a conclusion as to the defendant's mental state—that Rule 704(b) commands the expert to be silent." *Id.* at 309 (citation omitted). In *Watson*, the court simply held that the expert had taken that prohibited step when the prosecutor asked questions that made repeated references to the defendant's intent and elicited a response from the expert that the defendant "possess[ed] with the intent to distribute to someone else," thereby violating the plain text of Rule 704(b). *Ibid.* (brackets in original). That holding does not conflict with First Circuit precedent, or the reasoning of the court of appeals below.

3. Review is also unwarranted because any error in the admission of Agent Flood's testimony was harmless in light of the compelling independent evidence that petitioner knew about the drugs in the Ford. See *Neder* v. *United States*, 527 U.S. 1, 18 (1999) (applying harmless error to evidence admitted in violation of the Fifth Amendment); Fed. R. Crim. P. 52(a). A defendant's knowledge can be established by circumstantial evidence. See, *e.g.*, *Ruan* v. *United States*, 142 S. Ct. 2370, 2382 (2022). And in drug cases, such evidence can include the defendant's possession of a large sum of cash

or contraband, see, *e.g.*, *United States* v. *Laines*, 69 F.4th 1221, 1227, 1230 (11th Cir. 2023); *United States* v. *Knox*, 888 F.2d 585, 588 (8th Cir. 1989), as well as a false pretrial exculpatory statement that shows consciousness of guilt, see, *e.g.*, *United States* v. *Dawkins*, 999 F.3d 767, 795 (2d Cir. 2021); *United States* v. *Ath*, 951 F.3d 179, 187 (4th Cir.), cert. denied, 140 S. Ct. 2790 (2020); *United States* v. *Hughes*, 840 F.3d 1368, 1385 (11th Cir. 2016), cert. denied, 137 S. Ct. 1354 (2017).

Both types of evidence are present here. Petitioner was caught at the border as the driver and sole occupant of a car concealing 54½ pounds of pure methamphetamine worth at least $368,550. That is the sort of physical evidence that courts have found "virtually conclusive of guilt" in importation cases. *United States* v. *Whitehead*, 200 F.3d 634, 639 (9th Cir.), cert. denied, 531 U.S. 885 (2000). In addition, petitioner's pretrial statements to Agent Porter concerning her presence in the Ford contained multiple indications of falsity. Although she identified the owner of the Ford as her boyfriend "Jesse," she provided no details about him: she did not know where "Jesse" lived, or his phone number. Although petitioner said that she had spent the previous few days with "Jesse" and his friends—including two nights at one friend's home—she was unable to name a single person she was with. Petitioner also said that a "friend" had given her the second phone, but would not identify that friend either. And petitioner's statement that she did not like to drive at night because she cannot see in the dark was inconsistent with her decision to drive at 2 a.m. when she was apprehended at the border.

Petitioner's transparently flimsy story, combined with the large quantity of methamphetamine found in her car and her arrival at the border in the middle of the

night, provided a specific and convincing basis for the jury to find beyond a reasonable doubt that petitioner knew that she was carrying the methamphetamine in the Ford. It accordingly would have made such a finding with or without Agent Flood's more generalized testimony about drug-courier practices.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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